Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Communications Assistance for	)	ET Docket 04-295
Law Enforcement Act and	)	
Broadband Access and Services	)	RM No. 10865

COMMENTS OF EARTHLINK, INC.

John W. Butler
Earl W. Comstock
Robert K. Magovern
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500

David N. Baker
Vice President for Law
and Public Policy
EarthLink, Inc.
1375 Peachtree Street
Atlanta, GA 30309

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EarthLink is one of the nation's largest Internet Service Providers ("ISPs"), serving over 5 million customers nationwide with dial-up, broadband (DSL, cable and satellite), web hosting and wireless Internet services. EarthLink regularly receives awards for its customer service and innovation, including the 2004 J.D. Power and Associates award for highest customer satisfaction among both dial-up and high speed Internet service providers.

EarthLink files these comments in response to the Notice of Proposed Rulemaking and Declaratory Ruling (hereinafter "NPRM") issued by the Commission on August 9, 2004 in the above-referenced proceeding.[1] Issued in response to a Joint Petition filed on March 10, 2004 by the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively "Law

[1] In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295 (Aug. 9, 2004) (hereinafter "NPRM").

Enforcement"),[2] the NPRM in part requested comment on the Commission's tentative conclusion that facilities-based providers of any type of broadband Internet access service are subject to the requirements in the Communications Assistance for Law Enforcement Act[3] (hereinafter "CALEA") because they provide a replacement for a substantial portion of the local telephone exchange service, and thus such providers should be treated as telecommunications carriers under the statute.[4]

As an ISP that serves millions of customers with broadband Internet access service, EarthLink is directly affected by the tentative conclusions drawn by the Commission. Under the Commission's analysis, an ISP that would otherwise have qualified for an express statutory exemption under a plain reading of the statute now may be subject to CALEA requirements. The Commission's reading of CALEA in the NPRM effectively reads the "information service" exemption out of the statute, and it is clear that such an interpretation is contrary to law. Further, the approach chosen by the Commission will not only fail to provide Law Enforcement the access that it seeks, but will also greatly enhance the uncertainty facing the industry about which providers are subject to CALEA requirements. Because the proper regulatory treatment of broadband Internet access services under CALEA is vital to the business in which EarthLink is engaged, it is to those services and the applicability of the provisions in CALEA that EarthLink primarily addresses in these comments.

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[2] United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration*, Joint Petition for Expedited Rulemaking*, RM-10865 (Mar. 10, 2004) (hereinafter "*Joint Petition"*).

[3] Pub. Law 103-414, 108 Stat. 4279 (1994), codified generally at 47 U.S.C. §§ 1001 *et seq.*

[4] NPRM at ¶ 37.

I. THE COMMISSION'S READING OF THE STATUTE IMPERMISSIBLY RENDERS MEANINGLESS THE "INFORMATION SERVICES" EXCLUSION UNDER CALEA, AND IS THUS CONTRARY TO LAW.

A. The Commission's Statutory Analysis Regarding Which Providers Are Subject to CALEA Requirements Falls Short of What the Law Requires.

CALEA requires "telecommunications carriers" to ensure that their equipment, facilities, and services are capable of providing real-time surveillance capabilities to support law enforcement agencies.[5] CALEA defines a "telecommunications carrier" as "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire" and includes "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of local telephone exchange service . . . ."[6] In determining which entities were required to comply with the provisions of CALEA, Congress affirmatively excluded from the definition of "telecommunications carrier" any person or entity "insofar as they are engaged in providing information services."[7] However, relying solely on the language in the second clause in subparagraph (B) of the CALEA definition of "telecommunications carrier," the Commission tentatively concluded in its NPRM that all facilities-based providers of any type of broadband Internet access service are subject to CALEA because

[5] 47 U.S.C. § 1002(a)(1-4)

[6] 47 U.S.C. § 1001(8)(A)-(C).

[7] 47 U.S.C. § 1001(6).

they "provide a replacement for a substantial portion of local telephone exchange service used for dial-up Internet access service."[8]

The Commission's analysis of CALEA falls well short of what the law requires. Before even reaching the question of what person or entity should fall within the "substantial replacement" clause of the "telecommunications carrier" definition in CALEA, the structure of the statute illustrates that the Commission must first determine what qualifies as an "information service." The Commission's tentative conclusion, which is based solely upon the statutory construction of the term "telecommunications carrier," is legally insupportable because the statutory language in CALEA explicitly exempts any person or entity — regardless of whether or not they are a "telecommunications carrier" — "insofar as they are engaged in providing information services."[9] In this regard, the information service provision would serve to exempt even those persons or entities that may fall within the "substantial replacement" clause of the "telecommunications carrier" definition. Thus, in order to determine whether a person or entity must comply with the assistance capability requirements of section 103(a) of CALEA,[10] the Commission's first step must be to examine to what extent such a person or entity is engaged in providing "information services." The tentative conclusion drawn by the Commission, in essence, instead uses the "substantial replacement" clause to effectively carve the "information services" exception out of the statute. There is no

[8] NPRM at ¶ 37.

[9] *See* 47 U.S.C. § 1001(8)(C). *See also* 47 U.S.C. § 1002(b)(2)(A), which explicitly exempts "information services" from the intercept requirements of section 103(a) of CALEA.

[10] *See* 47 U.S.C. § 1002(a).

question that such a statutory interpretation is contrary to law. For this reason alone, it is unlikely the Commission's tentative conclusion will survive any judicial review.

B. Because the Definitions of "Information Service" in the Communications Act and "Information Services" in CALEA Are Functionally Identical, the Decision in *Brand X* is the Only Legally Permissible Course Under Which CALEA Will Apply to Broadband Internet Access Services.

To survive judicial scrutiny, the Commission must approach the "information service" question directly. As EarthLink argued in response to the Joint Petition filed by Law Enforcement, in resolving the question of what constitutes "information services," the Commission must consider not only the definition of "information services" under CALEA,[11] but also the definition of "information service" under the Communications Act as well.[12] The reason the Commission must consider both definitions is because Congress used the same operational language in both.[13] As such, an "information service" under the Communications Act by definition also constitutes "information services" under CALEA.[14]

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[11] 47 U.S.C. § 1001(6).

[12] 47 U.S.C. § 153(20).

[13] *Compare* 47 U.S.C. § 1001(6) ("The term 'information services' (A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications…") *with* 47 U.S.C. § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications…").

[14] While the Commission has said that CALEA determinations must be based on the CALEA definitions because the Telecommunications Act of 1996 did not modify CALEA, it also said that "we expect in virtually all cases that the definitions in the two Acts will produce the same results...." *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCCR 7105, 7112 at ¶ 13 (Aug. 31, 1999). To the extent that there are differences, the statutory definition of "information services" in CALEA is actually broader than the definition of "information service" under the Communications Act. This is so for two reasons. First, the CALEA definition also explicitly includes "electronic messaging services" that are separately defined in CALEA and are not explicitly referred to in the Communications Act. Second, the exclusion for management, control, or operation of a

Undoubtedly aware that it has held in several proceedings that broadband Internet access services are *solely* "information services,"[15] the Commission recognized that it could not reach its desired outcome of including all providers of broadband Internet access services under CALEA if it followed its previous decisions regarding the scope of the term "information service." Indeed, the Commission in the NPRM notes an "irreconcilable tension" between its conclusion that broadband access providers fall within the definition of covered "telecommunications carriers" and the fact that they would be excluded by the definition of "information services."[16] However, instead of finding that such companies were exempt to the extent that they provided information services, the Commission instead "interpreted" the law to mean that any company that falls within the "substantial replacement" clause of the telecommunications carrier definition "by definition cannot be providing an information service for the purposes of CALEA."[17] This is further evidence that what the Commission proposes to do through its tentative conclusion in this proceeding is to simply read the express information service exclusion out of CALEA, primarily because the FCC has read the same provision to mean something entirely different in other proceedings.

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telecommunications network is narrower in CALEA than in the Communications Act. *Compare* 47 U.S.C. § 1001(4) (electronic messaging service), 47 U.S.C. § 1001(6)(B) (included services), and 47 U.S.C. § 1001(6)(C) (excluded services) *with* 47 U.S.C. § 153(20) (Communications Act definition of "information service"). Therefore, at a minimum, the CALEA exemption for "information services" includes any "information service" under the Communications Act.

[15] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket 02-33 (Feb. 15, 2002); [15] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* Declaratory Ruling, GN Docket No. 00-185 (Mar. 15, 2002) (hereinafter "*Cable Modem Declaratory Ruling"*).

[16] NPRM at ¶ 50.

[17] *Id.*

Because the definitions of "information services" in CALEA and the Communications Act are functionally identical, it is clearly impermissible for the Commission to read the definition one way in the Cable Modem Declaratory Ruling and another in the tentative conclusion at issue in this proceeding. To resolve this discrepancy, it is clear at this stage of the proceeding that there is only one statutory construction that is permissible under both CALEA and the Communications Act that will also provide Law Enforcement with the access to broadband Internet access services that it seeks. That statutory construction is the one adopted by the Ninth Circuit Court of Appeals in *Brand X Internet Services v. FCC*, [18] where the court held that every information service offered to the public for a fee is by definition delivered over a common carrier transmission service. The only legally defensible course under which CALEA will apply to the transmission component of broadband Internet access services is for the Commission to accept the holding in *Brand X* that Internet access offered to the public for a fee contains a common carrier "telecommunications service." Because the Commission refuses to do so, it has instead attempted to bypass the statute through an improper interpretation of its provisions. This course of action is not consistent with the statutory language in CALEA, and therefore cannot withstand judicial scrutiny for the reasons stated above.

[18] *Brand X Internet Services v. FCC* , 345 F.3d 1120 (9th Cir. 2003), *petition for cert. filed* (Aug. 30, 2004) (Nos. 04-277 and 04-281).

C. The Definitions of "Telecommunications Carrier" in the Communications Act and CALEA Are Functionally Identical.

The Commission bases its tentative conclusion that providers of broadband Internet access services must comply with CALEA on a construction of the statute that it believes "demonstrate[s] that the meaning of 'telecommunications carrier' in CALEA is broader than its meaning under the Communications Act."[19] To support this interpretation, the Commission relies on "facial differences in the statutory language."[20] Highlighting further evidence of the Commission's flawed rationale for ignoring the "information services" exclusion, the definitions of "telecommunications carrier" in the two statutes are in fact functionally identical. "Telecommunications service," as it is defined in the Communications Act is unmistakably included in the CALEA definition of "telecommunications carrier," which means in relevant part "a person or entity *engaged in* the transmission or switching or wire or electronic *communications as a common carrier for hire*. . . ."[21] The Communications Act also defines "telecommunications carrier" as any provider of "telecommunications service."[22] Telecommunications service is defined as the "offering of telecommunications for a fee directly to the public,"[23] which is indistinguishable from CALEA's providing of "communications as a common carrier for hire. . . ."[24]

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[19] NPRM at ¶ 38.

[20] *Id.* at ¶ 41.

[21] 47 U.S.C. § 1001(8)(A) (emphasis added).

[22] 47 U.S.C. § 151(44).

[23] 47 U.S.C. § 153(46).

[24] 47 U.S.C. § 1001(8)(A).

Congress made the linkage between Communications Act common carriers and CALEA telecommunications carriers explicit when it enacted section 301 of CALEA. Section 301 added section 229 to the Communications Act which provides that the CALEA implementing rules adopted by the Commission "shall include rules to implement *section 105 of the Communications Assistance for Law Enforcement Act that require common carriers*" to take certain privacy related actions.[25] Section 105 of CALEA does not use the term "common carriers," but speaks instead of "a telecommunications carrier . . . ."[26] In order for the cross-reference between the sections to have any meaning at all, the terms "common carrier" under the Communications Act and "telecommunications carrier" under CALEA must be interchangeable.

In further support for the fact that common carriage is the touchstone of the relevant terms in both statutes, section 3(44) of the Communications Act provides that "[a] telecommunications carrier shall be treated as a common carrier only to the extent that it is engaged in providing telecommunications services."[27] The Communications Act defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio,"[28] a formulation that is again indistinguishable from CALEA's "switching of wire or electronic communications as a

[25] 47 U.S.C. § 229(b) (emphasis added).

[26] 47 U.S.C. § 1004.

[27] 47 U.S.C. § 153(44).

[28] 47 U.S.C. § 153(10). The Commission attaches tremendous significance to the difference between transmission and switching. *See* NPRM at ¶ 43. In fact, the definitions of both wire and radio communication include "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." *See* 47 U.S.C. § 153(33) and 47 U.S.C. § 153(52).

common carrier for hire. . . ."[29] Moreover, section 102(1) of CALEA provides that, for purposes of CALEA, "[t]he terms defined in section 2510 of title 18, United States Code, have, respectively, the meanings stated in that section."[30] Section 2510(10) of title 18, in turn, provides that "'communications common carrier' has the meaning given that term in section 3 of the Communications Act of 1934,"[31] thus completing the definitional chain that makes common carriage under the Communications Act the same as common carriage under CALEA. Thus, contrary to the Commission's assertion that the scope of CALEA's definition of "telecommunications carrier" is to be "more inclusive than that of the Communications Act,"[32] the two statutes are in fact functionally identical with respect to the definition of regulated common carrier services. As a result, the Commission's tentative conclusions are based upon an impermissible reading of the plain language of the statute, even if the Commission bases those conclusions on the premise that "entities and services subject to CALEA must be based on the CALEA definition."[33]

[29] 47 U.S.C. § 1001(8)(A).

[30] 47 U.S.C. § 1001(1).

[31] The term defined in section 3 of the Communications Act is "common carrier." 47 U.S.C. § 153(10). That this is the term intended to be referenced in 18 U.S.C. § 2510 is clear from an earlier version of section 2510, which referred to "section 153(h) of title 47 of the United States Code." The reference was changed by section 4002(e)(10) of Public Law 107-273 (Nov. 2, 2002). Prior to the passage of the Telecommunications Act of 1996, the Communications Act definition of "common carrier" was codified at 47 U.S.C. § 153(h). *See* section 3(c) of the Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 61, (1996).

[32] NPRM at ¶ 41.

[33] *Id.*

II. THE COMMISSION'S NPRM IS PROCEDURALLY DEFICIENT BECAUSE IT FAILS TO PROVIDE ADEQUATE NOTICE OF THE AGENCY'S INTENTIONS AND IT MUST BE CLARIFIED BEFORE IT CAN SERVE AS THE BASIS FOR ANY FINAL RULE.

A. The NPRM Does Not Actually Propose Any Regulatory Criteria Which Would Allow Providers To Know Which Equipment Must be CALEA Compliant.

In addition to the problems with the Commission's statutory interpretation on which it bases its tentative conclusions, the NPRM is also so procedurally deficient that any final rule emerging from it could also face serious legal challenges on procedural grounds as well.[34] The basis of the deficiency is the NPRM's failure to comply with the "notice" element of the notice-and-comment requirements for rulemaking codified in the Administrative Procedures Act ("APA"), 5 U.S.C. §553(b)(3). This section requires that the notice must include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[35] The NPRM – although it asks numerous questions and seeks comment on numerous issues – does not provide sufficient information concerning the terms or substance of any proposed rule. The mere inclusion of issues in a lengthy NPRM does not mean that sufficient notice has been provided.[36]

Courts have repeatedly held that section 553(b)(3) makes clear that it is the responsibility of the agency proposing the regulations to ensure that the "notice be clear

[34] Courts will entertain procedural challenges even when a challenge to a substantive point is not allowed. *See, e.g., American Medical Assoc. v. Reno*, 57 F.3d 1129, 1134 (D.C. Cir. 1995).

[35] *Id*. (emphasis added).

[36] *See generally National Tour Brokers Association v. United States*, 591 F.2d 896 (D.C. Cir. 1978).

and to the point."[37] The NPRM is neither clear nor to the point. In the beginning of the NPRM, the Commission admits that the "record in this proceeding needs to be more fully developed and weighed before a final determination is made."[38] Further, the Commission requests "additional legal and technical information" from Commenters regarding how best to apply the tentative statutory conclusions it has drawn. In this sense, the NPRM not only requires commenters to frame the issues themselves, but also reflects the lack of legal and technical support for which the Commission has to base its tentative conclusions.

Turning to the specifics of the NPRM, the Commission has not formally identified with sufficient clarity the persons or entities that would be covered under CALEA's requirements. Essentially, the Commission has provided no guidance upon which the industry can rely. It is clear that the Commission has not made a case for undertaking rulemaking at this time. At best, the most that can be said of the NPRM is that it is an effort by the Commission to gather more information in an attempt to issue a proposed rule based on a more complete record. This does not meet the standard for notice-and-comment rulemaking under the APA.

The NPRM asks a lot of questions, in fact more than it purports to answer. The answers to these questions can and should be used to develop a well-articulated proposed rule. However, before a final rule can be issued, it is necessary that the Commission cure the defects of the of the current NPRM by issuing a second NPRM, one which will use the information obtained through this round of comments to propose a rule that both

[37] *See McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988); *see also Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994).

[38] NPRM at ¶ 34.

provides the Commission with a rule capable of withstanding judicial scrutiny, as well as inform commenters of the actual proposals being made so that appropriate comments may be made in context.

B. The Commission's Proposed Outcome Cannot Be Upheld On the Grounds Offered By the Agency And Therefore Has Not Given Law Enforcement What It Needs.

In its Joint Petition, Law Enforcement asked the Commission to resolve, on an expedited basis, various issues still associated with the implementation of CALEA. Foremost among these issues was Law Enforcement's request that the FCC formally identify the types of services and entities that are subject to CALEA. The Commission has not done so in the NPRM. More significantly, Law Enforcement requested that the Commission find that broadband Internet access services are subject to CALEA. Through its flawed statutory analysis, the Commission has attempted to give Law Enforcement what it has asked for by holding that all facilities-based providers of any type of broadband Internet access service are subject to CALEA because they provide a replacement for a substantial portion of the local telephone exchange service.

The reality in this proceeding is that, for the reasons stated above, the Commission's conclusions will undoubtedly be challenged in court. Under the test set forth in *SEC v. Chenery Corp.*[39] and upheld in *Motor Vehicle Mfrs' Assn. v. State Farm*[40] "an agency's action must be upheld, if at all, on the basis established by the agency itself."[41] Thus, under this standard, the only theory by which any court could uphold the

[39] 318 U.S. 80 (1943).

[40] 463 U.S. 29 (1983).

[41] *Id.* at 50.

Commission's tentative conclusions, would be under the erroneous statutory interpretations tentatively adopted by Commission. In other words, Law Enforcement could not look to the courts to resolve the flawed statutory interpretations set forth by the Commission. This being the case, the Commission has only delayed any clarity regarding CALEA's application to broadband Internet access services. Obviously, this does not mirror Law Enforcement's request for an "expedited" review, nor does it then reflect the Commission's primary policy goal in this proceeding to "ensure that LEAs have all the resources that CALEA authorizes to combat crime and support Homeland Security."[42]

C. The Commission's Proposed Outcome Has Not Given the Industry Any Certainty or Guidance, But Has Only Perpetuated Further Legal Uncertainty.

Another stated policy goal of the Commission in this proceeding was to "remove to the extent possible any uncertainty that is impeding CALEA compliance."[43] As the foregoing analysis has made clear, the issue regarding the statutory construction of the definition of "information service" has been wholly ignored by the Commission, and must be dealt with head-on before any final rule could be promulgated. Unless the Commission makes clear now that every information service offered to the public for a fee by definition includes an underlying common carrier transmission service, the issue of CALEA's applicability to broadband Internet access services will be raised with respect to each and every information service, causing further procedural delays. The tentative conclusions drawn by the Commission in this proceeding ensure that this NPRM

[42] NPRM at ¶ 4.

[43] NPRM at ¶ 34.

will warrant review by the courts. Further, because the statutory interpretations by the Commission are clearly contrary to law, there is very little likelihood these conclusions will withstand judicial scrutiny. In short, the Commission has done nothing to provide the industry with any certainty or guidance, but instead has merely prolonged the very legal uncertainty it purportedly sought to resolve.

CONCLUSION

For the reasons stated herein, EarthLink urges the Commission to issue a second notice of proposed rulemaking wherein it begins any inquiry regarding CALEA's application to broadband Internet access services with a discussion of what constitutes an "information service." Further, EarthLink maintains that the Commission must consider the definitions of "information service" and "telecommunications service" in the Communications Act as well as in CALEA, because such definitions are functionally identical. Finally, in order to survive judicial scrutiny and ultimately provide Law Enforcement the access that it seeks, EarthLink reiterates to the Commission that the only statutory construction permissible under both CALEA and the Communications Act is that every information service offered to the public for a fee by definition includes a common carrier transmission service. Any other reading of the statutes would be contrary to law, and only ensure even further delay in this proceeding.

Respectfully submitted,

/s/ Earl W. Comstock

John W. Butler
Earl W. Comstock
Robert K. Magovern
SHER & BLACKWELL LLP
1850 M Street, N.W.
Suite 900
Washington, DC 20036
(202) 463-2500

David N. Baker
Vice President for Law
and Public Policy
EarthLink, Inc.
1375 Peachtree Street
Atlanta, GA 30309

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